Judicial Review by the Burger and Rehnquist Courts:
Explaining Justices' Responses to Constitutional Challenges

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Abstract: In this paper, we assess various influences on U.S. Supreme Court justices' behavior in cases involving judicial review of federal, state and local statutes. Focusing on challenges to the constitutionality of statutes considered by the Burger and Rehnquist Courts during the 1969 to 2000 Terms, we evaluate the impact of attitudinal, institutional, and contextual variables on individual justices' votes to strike or uphold statutes challenged before the Court. We find that the justices' ideological responses to the challenged statutes, the extent of amicus support for the statute, the support of the Solicitor General, congressional preferences, and the existence of a civil liberties challenge to the statute are all significantly related to the justices' votes to invalidate or uphold statutes. We also find that in the Rehnquist Court, conservative justices are less likely to strike state statutes, but more likely to strike federal laws than their liberal counterparts, while no similar "federalism" dimension emerges in the Burger Court. Indeed, in the Burger Court, a distinct pattern emerges with conservative justices more restraintist than liberal justices in both state and federal cases.

I. Introduction

Scholars of judicial politics and law have demonstrated a continuing fascination with the "countermajoritarian difficulty" posed by the institutional position and characteristics of the United States Supreme Court within American democracy (see Friedman, 2002). Since the Court's decision in *Marbury v. Madison* (1803)[1], many academics and politicians have lamented the tension between democratic governance and an unelected judiciary's exercise of judicial review. As Friedman (2002) points out, criticism of the Court's exercise of judicial review has emerged both from the right and the left, depending on the historical context. Recent decisions by the Rehnquist Court striking down progressive legislation like the Violence Against Women Act,[2] for example, have drawn criticism from liberals; the Warren Court's decisions in the area of criminal rights and civil liberties drew the wrath of many conservatives.

Without question, the Court's authority to review the constitutionality of legislative enactments is among its most important powers. A decision to invalidate a federal statute often raises issues related to separation of powers and democratic theory (see, e.g., Dahl 1957; Bickel 1986; Ely 1980; Choper 1980). On the other hand, when the Court invalidates state or local legislation under the U.S. Constitution, its decision implicates issues of federalism and the scope of state sovereignty and autonomy. Thus, decisions involving constitutional challenges to federal, state or local laws are often among the most politically sensitive and consequential acts the Court can undertake, and continue to provide fuel for the debate regarding the proper role of the Supreme Court and the appropriate application of its power.

While much has been theorized regarding the implications and consequences of the use of judicial review, less is known about the likelihood of the application of this considerable power by the individual justices. What factors lead the justices to eschew deference and strike a law promulgated by a duly elected body? What factors motivate the justices to restrain their personal preferences and bow to the will of a majority? In this paper, we seek to evaluate the influences that affect the individual justices' choices to strike or uphold federal, state or local statutes and ordinances. We explore the individual justices' responses to such constitutional challenges brought in 213 cases during fifteen terms of the Rehnquist Court (1986-2000), and 433 such constitutional challenges brought during the sixteen terms of the Burger Court (1969-1985). We also compare the manner in which the Burger and Rehnquist Courts have exercised this significant power.

In particular, we construct a model of the justices' voting behavior that draws upon theoretical perspectives stemming from attitudinal, strategic and neo-institutional models of judicial behavior. In doing so, we address several research questions. First, how do the justices' attitudes influence their votes to strike or

uphold federal and state legislation? Do their attitudes toward states' rights and federalism modify or condition their ideological reactions to these laws and does any such dynamic vary between the Rehnquist and Burger Courts? Second, do the justices demonstrate any strategic or institutional concerns with respect to the position of the Solicitor General on the statute in question or to congressional preferences? Similarly, are the justices responsive to interest group pressure in these cases? Finally, do legal standards systematically influence the justices' decisions to strike legislation?

In the following sections, we explain the theoretical underpinnings of our study, present our hypotheses, and specify and estimate a model to test the hypothesized relationships empirically. The results of our study demonstrate, first, that decision making in judicial review cases in the Burger and Rehnquist Courts is largely shaped by the same forces, indicating some enduring characteristics associated with these unique disputes. We also find that the members of both the Burger and Rehnquist Courts are responsive to a number of different factors when assessing the constitutionality of legislative enactments, including their own ideological predispositions toward the substantive policy embedded in the statute, congressional preferences, the Solicitor General's position on the statute, interest group pressure in the form of briefs amicus curiae, and the nature of the legal challenge brought against the statute at issue. The results from both courts suggest that liberals are more likely to strike state statutes than are conservatives, but only on the Rehnquist Court are conservatives more likely than liberals to strike federal statutes. In contrast, in the Burger Court, conservatives were more restrained with respect to both federal and state statutes.

II. Theory and Hypotheses

Political scientists who have studied the Supreme Court's exercise of judicial review have typically focused on the question whether the Court does, indeed, act in a countermajoritarian fashion to protect the rights of minorities (e.g. Dahl 1957; Casper 1976). In the seminal study in this tradition, Dahl (1957) concluded that the Supreme Court, as a member of the "national ruling coalition," generally exercises its power of judicial review in ways that conform to the dominant coalition's policy agenda. Thus, rather than protecting minority rights against infringement by the majority, Dahl argued that the Court is typically supportive of the policies of other political institutions at the time the decision is rendered—largely because the Court's membership has been at least partially formed by the dominant coalition. As evidence for this thesis, Dahl presented findings that the bulk of cases in which federal legislation was declared unconstitutional occurred more than four years after the legislation was enacted, and suggested that the Court was reluctant to invalidate legislation enacted by the "live" or current national majority. Dahl also presented evidence that of those federal statutes declared

unconstitutional by the Court within four years of passage, Congress often responded by reversing the Court's decisions through legislation or constitutional amendment. As a result, Dahl concluded that the Court, through its exercise of judicial review, does not play a particularly countermajoritarian role.

Other scholars have disputed Dahl's findings, especially in light of post-1957 decisions by the Court. According to Casper (1976), for example, Dahl's characterization of the Court fails to account fully for decisions of the Warren Court striking down state or local legislation, recognizing that such decisions often had far-reaching national consequences. Others have used Dahl's work as a springboard to evaluate the influence of the Court's exercise of judicial review on the process of partisan polarization prior to critical electoral realignments (Funston 1975; Gates 1984, 1987). In general, these scholars have argued that, far from serving a "legitimacy-conferring" function for majority policies, the Court often contributes to political realignment through decisions that destabilize the majority coalition (Adamany 1973; Gates 1987; but see Canon and Ulmer 1976). On the other hand, researchers have also recently demonstrated that while most Supreme Court decisions invalidating federal statutes are not reversed by Congress, determined and united majorities are often quite effective at reversing individual decisions from time to time (Meernik and Ignagni 1997). Based on their findings regarding congressional attempts and successes at reversing the Court, Meernik and Ignagni conclude, for example, that "the constitutional system of checks and balances is keeping the Supreme Court from dominating the other branches through the use of judicial review" (1997, 464). This conclusion is also consistent with the notion that the Supreme Court often renders decisions that are consistent with public opinion (Marshall 1989; Barnum 1985; Fleming and Wood 1997; Stimson, McKuen and Erikson 1995).

This debate among political scientists reflects the importance of the Court's role in the national policy-making process through its authority to invalidate federal, state and local statutes.[3] Yet existing studies' focus on the broader political or theoretical implications of the Court's judicial review decisions have often ignored the micro-level decision-making processes involved in those decisions. Recently, however, several studies have modeled the individual justices' votes in judicial review cases. Segal and Spaeth (2002) explored the nature of the individual justices' choices to invalidate actions of federal, state and local authorities,[4] finding that, for the Rehnquist Court, the justices' votes to invalidate or uphold were dominated by ideological considerations, with liberal justices voting to strike conservative statutes, and vice versa for conservative justices (ibid, 415-16). Howard and Segal (2004) followed this analysis with an evaluation of the justices' responses to requests from litigants to declare laws unconstitutional. To identify litigant requests for the Court to exercise its power of judicial review, Howard and Segal content analyzed briefs filed in all cases decided

between 1985 and 1994. They found that the Court does not declare laws unconstitutional sua sponte, nor does the Court utilize this important power often. Finally, Salas and Spriggs (2004) consider the influence of congressional preferences on the justices' attitudinal voting behavior in challenges to federal legislation by separating the period between 1946 and 1999 into different regimes depending on the likelihood of the best legislative response to the Court's decisions. They find that, in those regimes where the justices are more likely to vote strategically, attitudinal considerations still dominate their voting behavior.

In this study, we build on this existing research by constructing a model that incorporates a number of potential influences on the justices' behavior, including variables drawn from the attitudinal model and from theoretical perspectives highlighting institutional and contextual factors that affect the justices' decisions. We do so in the context of challenges to both federal and state laws, thus distinguishing our study from existing research. We test our model using decisions involving the potential exercise of judicial review in the Burger Court (1969 to 1985 Terms) and the Rehnquist Court (1986 to 2000 Terms). Below we set forth these theoretical expectations regarding the justices' decision making in cases involving challenges to federal, state and local statutes.

A. The Justices' Ideology

We begin with the dominant model of Supreme Court decision making in the literature: the attitudinal model. Without question, the justices' votes are often substantially influenced by their ideological predispositions (Segal and Spaeth 2002). Especially given Segal and Spaeth's recent investigation of judicial review cases described above, we therefore expect that the justices' votes to uphold or invalidate federal, state or local legislation will be substantially influenced by their attitudinal responses to the policy positions furthered by those statutes (Howard and Segal 2004). For example, we expect that, when considering a constitutional challenge to a statute that restricts abortion rights for women, liberal justices will be more likely to vote to invalidate the law, and conservative justices more likely to uphold the law. This attitudinal expectation thus involves the justices' reactions to the substantive policy embedded in the statute at issue; where the justice's ideology is consistent with the policy outcome furthered by the statute, he or she will be less likely to vote in invalidate the law. Hence, our first hypothesis is that:

H_1: *When considering the constitutionality of federal, state or local laws, the justices' votes will be influenced by the consistency between the direction of the statute and the justices' ideological preferences.*

While the literature generally characterizes the justices' attitudinal predispositions along a single liberal-conservative ideological dimension, other case characteristics may stimulate the justices to respond to

countervailing considerations based on their attitudes toward federalism and states rights (for a thorough analysis of the multidimensional nature of the justices' attitudes, see Rohde and Spaeth 1976). Although the Burger Court is known for its more balanced treatment of congressional power vis a vis the states (see, e.g., Martin 1985), one of the Rehnquist Court's most distinguishing characteristics is its preoccupation with federalism and states' rights (Fallon 2002; Massey 2002; Whittington 2001). Most of the Court's pro-state-rights decisions may be attributed to the influence of the conservative justices on the Court. Indeed, many of the most recent decisions involving the Eleventh Amendment and state sovereign immunity have been rendered by minimum-winning coalitions of conservative justices including Justices Rehnquist, Scalia, Thomas, Kennedy and O'Connor. These cases illustrate the critical ideological divide within the Rehnquist Court concerning states' rights and the proper scope of federal power. Although we have already hypothesized that the statute's ideological direction (i.e. its substantive policy impact) will influence the justices' votes in judicial review cases, we also expect that, at least in the Rehnquist Court, ideological differences among the justices may also manifest themselves in relation to the source of the statute. That is, the justices' attitudes toward federalism may accentuate or mitigate the influence of their policy-specific preferences. For example, while we expect that liberal justices will be predisposed to strike conservative statutes, we also expect that liberals will be less inclined to strike federal as opposed to state statutes. Similarly, we expect that conservative justices will be more likely to strike federal as opposed to state statutes, especially in the Rehnquist Court. Thus, we offer our second hypothesis:

H_2: *The justices' ideological responses to the individual statutes will also be conditioned on the source of the legislation in question, with conservative justices more likely to strike federal statutes, and liberal justices more likely to strike state statutes.*

B. Strategic and Institutional Influences

In addition to attitudinal factors, recent research has focused scholars' attention on the extent to which the justices act strategically in response to their institutional environment and to the anticipated actions of other political actors (Epstein and Knight 1998; Maltzman, Spriggs and Wahlbeck 2000; Heberlig and Spill 2000). As Epstein and Knight observe, the justices "realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act" (1997, 4). In the context of judicial review, the justices may be particularly sensitive to the preferences of those actors in the coordinate branches in Congress and the executive branch, as well as to public opinion. While one might assume that the Court would be most likely to engage in strategic

interactions with the coordinate branches (especially Congress) in statutory cases—where the legislature may most easily alter the Court's outcome—the Court is not unconstrained in constitutional cases. As Friedman and Harvey suggest, "the sharp distinction between constitutional and statutory cases is flawed . . . [as] [t]here are numerous weapons a sitting Congress can apply against a Supreme Court deemed to be recalcitrant, including jurisdiction stripping, budget cutting, Court packing, and even the impeachment of Supreme Court Justices" (2003, 127). The executive branch may also participate or initiate such retaliatory action should the President find the Court's actions unacceptable. Moreover, public opinion and interest group pressure may similarly provide important constraints on the Court's choices to invalidate legislation to the extent such public sentiment may circumscribe or undermine implementation of the Court's decisions (see Rosenberg 1991), as well as provide the impetus for a political response by Congress and the President. Thus, our model of the justices' votes in judicial review cases should account for the influence of these institutional or external constraints on the Court's decision making.

In constructing our hypotheses, then, we begin with the Executive branch. As its representative, the Solicitor General has a remarkable record of success before the Court at both the certiorari and merits stages (see Segal 1990; Caldeira and Wright 1988; Pacelle 2003). This record reflects the good working relationship between the office and the justices, the significant deference the Court tends to afford the opinion of the Executive branch, as well as the lawyers' expertise in the Solicitor's office (McGuire 1995, 1998). Moreover, the Solicitor's record of success extends to all types of participation, whether as counsel or amicus curiae. Therefore, we anticipate that the presence of the Solicitor General, either as a counsel or as an amicus participant, will greatly influence the votes of the individual justices. If the Solicitor General appeals or intervenes and supports a challenged statute, we anticipate the law will survive the challenge. On the other hand, if the Solicitor opposes a statute, we expect that the justices will more likely vote to invalidate the statute.

H_3: *Support for a law by the Solicitor General, as party or amicus curiae, increases the likelihood of that the justices will vote to uphold the law; opposition by the Solicitor increases the likelihood that the justices will vote to strike the law.*

The extent to which the Supreme Court defers to the legislative branch is less clear; the evidence is mixed (see, e.g., Segal 1999; Segal and Speth 2002; Epstein and Knight 1998; Salas and Spriggs 2004). As noted above, most such studies focus on statutory interpretation by the Court, on the assumption that the Court is more constrained strategically by congressional action because Congress has greater retaliatory power in such cases (it can amend legislation with a simple majority and the President's acquiescence). With respect to the invalidation of a statute, however, cross-institutional influences are also potentially important. Unlike

straightforward statutory interpretation, judicial review results in a more direct rebuke to lawmakers. Moreover, Meernik and Ignagni (1997) have demonstrated that Congress can and often does respond to the Supreme Court by trying to reverse politically unpopular decisions involving the exercise of the Court's power of judicial review (see also Baum and Hausegger 1999). Meernik and Ignagni further find that this "retaliatory" response is particularly pronounced in situations in which the Court *invalidates a state statute,* a finding which would seem counterintuitive. Furthermore, as Epstein and Knight observe, even if the legislative constraint is theoretically more salient in statutory cases, we should not "ignore completely the external constraint imposed by the separation of powers in constitutional cases" (1998, 141). Their review of the justices' papers and correspondence provided evidence that the "the external constraint of the separation of powers system is in fact operative in some constitutional cases" (ibid, 157). Finally, in a recent study, Friedman and Harvey (2003) found that the Court was sensitive to the ideological composition of the sitting Congress when choosing whether to invalidate federal laws.

Thus, the justices may be sensitive to such cross-institutional pressure as they evaluate whether the strike a law challenged on its face. At the same time, such responsive behavior may not be completely strategic in nature. As noted above, Dahl (1957) postulated that the Court does not always act in a countermajoritarian fashion, but more typically conforms to the preferences of the dominant political coalition. Moreover, research on the direct influence of public opinion on the justices' behavior suggests that Court members are not immune from trends in the public mood—trends which are highly correlated with the policy preferences of those in Congress.

We note that some studies contradict the notion that the Court responds to the ideological preferences of members of Congress. For example, Howard and Segal (2004, 135-136), find that the justices do not appear constrained in years 1993 and 1994, at which time Democrats controlled both the presidency and Congress. Salas and Spriggs (2004) draw similar conclusions in their analysis of particular regimes (configurations of congressional preferences) most likely to generate strategic judicial voting behavior, finding no such influence. Segal and Spaeth (2002) and Segal (1999) also argue that separation of powers models do not adequately explain decision making on the Court in statutory cases. These studies generally characterize the influence of Congress in strategic terms. While we recognize that existing research calls into question strategic accounts of the justices' behavior, we conceptualize the influence of Congress more broadly to reflect both the preferences of members of Congress as well as general trends in public opinion. This perspective comports with other research, such as that of Neal Devins, arguing that, at least in the Rehnquist Court, the justices

decisions striking congressional statutes may be often viewed as "majoritarian" rather than "countermajoritarian." (Devins 2004). We propose that the justices may be more reticent to invalidate statutes that conform to prevailing congressional preferences,[5] either because they make strategic calculations regarding those preferences, because the justices constitute members of the dominant political coalition (see Dahl 1957), or because they respond to public opinion:

H_4: *The justices are less likely to invalidate a statute that is ideologically congruent with prevailing congressional preferences.*

Dahl's 1957 study debated the extent to which the justices are willing to strike legislation enacted by the dominant majority coalition, especially when that coalition remains in power at the time the statute is challenged. As a result, Dahl focused on the age of federal statutes challenged before the Court, finding that the Court most often invalidated statutes that were more than four years old at the time of the Court's decision. Dahl concluded that the Court's deference to newer statutes is a function of the Court's selection process. As new justices join the Court, they are more likely to share the values and attitudes of the dominant coalition in the elected branches at the time of their appointment. Thus, as Dahl noted, membership change will drive the Court to favor more modern policies simply because the Court is often itself a part of the current political coalition. If Dahl's hypthesis is valid, then, we might expect the Court to be similarly reluctant to invalidate statutes enacted by more recent legislative majorities.

In addition to reflecting Dahl's ideas, the age of the statute may be relevant for another reason related to legal considerations. To the extent that the Supreme Court's interpretation of the Constitution changes over time, which it surely does, older statutes may be more likely to fall subject to invalidation under a new constitutional formulation created at a later date. Thus, statutory age may be positively related to judicial review in at least two ways. On the other hand, one might also argue that older statutes are more immune to constitutional review because they have "stood the test of time." On balance, however, we conclude that the following hypothesis is most supported by the existing literature:

H_5: *As a statute or ordinance ages, the justices will be more likely to strike the law.*

In addition to external influence from Congress and the Solicitor, interest group involvement may also serve as a source of information to the justices concerning the public's reaction to Court decisions. The presence of amicus curiae, like that of the Solicitor General, is a well-documented and common occurrence before the Supreme Court. Amici briefs filed by interest groups, research suggests, reveal the breadth and scope of the issue for the justices as well as provide a gauge of current public opinion. At least one study has documented the influence of amicus curiae on the decision on the merits (McGuire 1995), although generally,

interest groups participating amicus curiae are most influential at the certiorari stage (Caldeira and Wright 1988, 1990). At the merits stage, the influence of amicus curiae could arise in several ways. First, the justices could be directly influenced by the arguments in the amicus briefs (Epstein and Kobylka 1992). Second, the justices may be influenced by the display of support for a particular position in terms of the number of briefs filed, or in terms of the prestige and reputation of the groups involved. Third, a selection effect may exist where more groups join the party with the most persuasive argument. For our purposes, we rely on differential support of amici for the parties challenging or defending the statute. We therefore hypothesize that the law of numbers will influence the perceptions and votes of the justices. If more briefs are filed on behalf of the statute or ordinance than opposing, the justices will be less prone to invalidate the law.

H_6: *Greater support by amicus curiae for the law decreases the likelihood of that the justices will vote to invalidate the statute.*

C. Legal Influences and Selection Effects

We also expect that the nature of the legal issues before the Court will affect its decision making. Legal challenges to statutes or ordinances based upon a civil liberties claim are simply less likely to survive judicial scrutiny. Such cases are often examined under strict standards of review, as opposed to the rational basis standard reserved for non-civil liberties challenges based on the Commerce Clause. Under the strictest level of scrutiny, in particular, the burden of the government to defend its statute is quite high—as some have claimed, it is "strict in theory, fatal in fact." As a result, more statutes challenged as violative of citizens' civil liberties will fail to pass constitutional muster, even before a more conservative Supreme Court.

H_7: *When reviewing statutes or ordinances challenged on the bases of civil liberties violations, the justices will be more likely to strike the law.*

Finally, we note that the judicial review cases heard by the Supreme Court do not arise on the Court's docket at random. Instead, the Court's certiorari process is complex and often involves strategic calculations on the part of the justices (Boucher and Segal 1995). As Brace, Hall and Langer (2001) note, if court intervention is non-random, ignoring this selection process raises the likelihood that conclusions about the forces affecting subsequent votes to invalidate legislation will be inaccurate (see, e.g, Heckman 1979). Although specifying a two-stage model would be optimal to account for this selection bias statistically, the data are not available on the certiorari process to enable us to do so. Like Brace et al. (2001) therefore, we incorporated a co-variate into our model to capture the dynamics of the selection process. In the Supreme Court, the nature of the lower courts' decisions in a case's procedural history affects the likelihood that the Court will hear the case (Caldiera,

Wright and Zorn 1999). In this context, in particular, we expect that the Court would be more likely to docket cases where the lower court had struck down a statute as unconstitutional. We have therefore incorporated this variable in an effort to control for the dynamics associated with the docketing process.

III. Data and Methods

Dependent Variable. To evaluate these hypotheses, we identified all cases heard by the Burger and Rehnquist Courts during the 1969 to 2000 Terms in which the constitutionality of a federal, state or local statute was challenged. To select our cases, we first used the "uncon" variable in the U.S. Supreme Court Database (Spaeth 2003) to find those cases in which a statute or ordinance had been found unconstitutional. We then used the "authdec" variables in that database to identify all cases where there may have been a constitutional challenge to the statute, and examined the opinion in each such case to determine whether it should be included. We cross-checked this list against those cases in the Benesh and Spaeth Burger and Rehnquist Court Justice-Centered Databases in which a justice was recorded as having voted to strike a statute or ordinance (Benesh and Spaeth 2003). This process resulted in the identification of 425 cases in the Burger Court and 192 cases in the Rehnquist Court in which the Court considered a constitutional challenge to a federal, state or local law.

Once we had identified the cases involving constitutional challenges, we used the Justice-Centered Databases to construct our dependent variable. We relind on the Benesh and Spaeth databases and our own review of each case to identify whether the individual justices voted on the constitutionality of the statute at issue. In particular, we evaluated concurring and dissenting opinions for each justice to ensure that he or she actually voted on the constitutionality of the statute. This coding process resulted in a dichotomous dependent variable, coded as 1 if the justice voted to strike the statute, and 0 if the justice voted to uphold the statute. Our data included 3938 votes from the Burger Court and 1992 votes from the Rehnquist Court for analysis.

Independent Variables.

Conformity between Statute and Justice Ideology. We have hypothesized that the justices' choices to strike or uphold a statute will be influenced by their attitudinal predispositions. Justices with conservative attitudes should be more likely to strike "liberal" statutes, and liberal justices more likely to strike "conservative" statutes. Thus, we needed to devise a measure that reflects consistency between the ideological orientation of the justice and of the statute itself.

We began by assigning each justice an ideological score using the Judicial Common Space Scores ("JCS Scores") developed by Epstein et al. (2005), a measurement strategy that has been used in existing

research (Salas and Spriggs 2004). The values of the JCS scores range from -.674 to +.801. We switched the signs on these scores such that positive values reflected liberalism, negative values conservatism. Although the JCS scores are calculated based on the justices' voting behavior, and thus may raise endogeneity problems for some analyses, we are less concerned about that problem with respect to our model. In particular, we are not predicting the directionality of the justices' votes, but rather whether they voted to strike a challenged statute. Use of the JCS Score scores to construct an independent variable therefore does not raise the same degree of concern as would be present if we were predicting the ideological direction of the justices' votes. In addition, estimation of the same model using the Segal-Cover scores to measure justice ideology—which are based on pre-appointment commentary about the justices' attitudes primarily in civil liberties cases—returned essentially the same substantive results (see Segal, Epstein, Cameron and Spaeth 1995). (We include those results in the Appendix.)

Next, we assigned an ideological score to the individual statutes at issue using the directionality codes in the U.S. Supreme Court Database. Thus, if the majority invalidated the particular statute, and the direction of the outcome was liberal, we coded the statute as "conservative," and vice versa for liberal statutes (see Segal and Spaeth 2002, ch. 10, using the same methodology[6]). Liberal statutes received a value on this statute ideology variable of 1, and conservative statutes –1. To construct a variable measuring the consistency between the statute and the justices' ideologies, then, we simply multiplied the statutory ideology variable by the justices' JSC scores. Since those scores were coded with positive values reflecting liberal orientations and negative values reflecting conservative orientations, the resulting figure will be positive when there is ideological congruity, and negative when there is not. Moreover, the value of the term will vary with the intensity of the justices' preferences. Indeed, extreme liberals may be expected to react more vociferously to a conservative statute than a moderate liberal or moderate conservative; this independent variable will reflect such variation among the intensity of the justices' attitudes along the liberal-conservative dimension. The more ideological consistency between the justice and the statute, the more likely the justice will vote to uphold the statute. We therefore expect a negative coefficient on this variable, which we have labeled "Consistency between Statutory Direction and Justice Ideology."

Orientation Toward Federalism. In addition to the straightforward attitudinal response we expect on the basis of the statutory policy, we also hypothesized a relationship between the justices' ideology and the source of the statute. According to the conventional wisdom, conservative justices on the Rehnquist Court are attitudinally predisposed to reduce federal power vis-a-vis the states and to enhance or protect state authority.

We have no similar a priori expectations regarding the Burger Court, but nevertheless test the relationship between ideological and statutory source for justices on that Court as well. Thus, we expect that the justices' reactions to the challenged statutes will vary depending on the source of the statute, as well as to the justices' ideological reaction to the underlying statutory policy. To evaluate this hypothesis, we created a multiplicative term composed of two variables: (1) whether the statute was a state statute or local ordinance (coded as 1) or a federal statute (coded as 0), and (2) the justices' JCS score. Interacting these two variables will enable us to evaluate whether liberal justices are more likely to strike state statutes and conservative justices less likely to strike state statutes, while use of the inteff program developed by Norton, Wang and Ai (2004) will enable us to determine whether that interaction effect is significance across all observations. Because we expect that liberal justices will be more likely to invalidate state statutes and conservative justices less so, we expect a positive coefficient on this variable.

Solicitor Support. The Solicitor may participate in a case either as counsel or as amicus curiae. In these judicial review cases, the Solicitor's support for either petitioner or respondent, whether as counsel or amicus, reflected his support or opposition to the statute at issue. For that reason, we created a variable to reflect whether the Solicitor supported or opposed the statute in his capacity either as amicus or counsel. Ultimately, there were very few cases in which the Solicitor opposed the statute while acting as party representative (where, for example, a state statute was challenged by the United States as violative of the Commerce Clause). As a result, we created three dichotomous variables that reflect whether (1) the Solicitor supported the particular statute or ordinance when appearing as a direct representative to a party in the case (the U.S. government), (2) the Solicitor supported the statute or ordinance when appearing as amicus in the case, or (3) the Solicitor opposed the statute or ordinance when appearing as amicus. The variables were coded 1 if the Solicitor's participation fell into one of the described categories, and 0 otherwise. Ultimately, we chose not to include the Solicitor as Party variable in the Burger Court models (although it is included in the Rehnquist Court models) because it consistently failed to achieve statistical significance and because it was collinear with our variable reflecting the source of the statute (and did not achieve significance even in the absence of the statutory source variable). Thus, we evaluated the impact of the Solicitor on Burger Court decision making only when he entered a case as amicus curiae.

Congressional Preferences. In our fourth hypothesis, we postulated that the justices would respond to congressional preferences. We conceptualized this variable as a measure of the ideology of Congress, under the supposition that the Supreme Court would be less likely to strike a statute that was ideologically consistent with

the prevailing majority in the legislature. To measure the ideology of Congress, we used the median legislator's Judicial Common Space Score from each chamber for the 91th through 106th Congresses (Epstein, Martin, Segal and Westerland 2005). These scores are calculated such that negative scores reflect liberal legislators, and positive scores reflect conservative legislators. We calculated the mean of these ideological medians to create a measure of congressional preferences across both chambers. To construct our measure of the congruence between the statute's ideological direction and congressional preferences, we first switched the signs on the Judicial Common Space scores such that positive scores were associated with liberal preferences. We then multiplied the JCS Congressional score corresponding to the Court's Term by the direction of the statute (coded as 1 for liberal statutes, -1 for conservative statutes). Positive values on this measure thus reflect contemporaneous ideological congruence between the statute and the sitting Congress, negative values reflect a lack of congruence. We expect a negative coefficient on this variable.

Age of Statute. As we note above, if the justices are indeed part of the governing coalition as suggested by Dahl (1957), we would expect that statutory age would be related to the justices' votes to invalidate legislation. To measure the age of each statute, we simply subtracted the date of each statute's enactment from the Court Term in which the case was decided.[7] Because we expect the justices to be more reluctant to invalidate laws from more recently elected legislative bodies, we expect a positive coefficient on this variable. Because of the extreme skewness in this variable's distribution, we employ the natural log of this variable in our models.[8] Other specifications of this variable, including quadratic formulations, were not significant in any of our models.

Amicus Support. We hypothesized that the justices would be responsive to public opinion and potentially to interest group support or opposition to statutes as expressed through amicus curiae participation. To measure the influence of amici, we counted the number of amicus briefs (not signatories) filed in support or opposition to the statute at issue. We did so by cross-referencing amicus data recorded in both Lexus and Westlaw to ensure that our counting was accurate. We then subtracted the number of opposing briefs from the number of supporting briefs in each case.[9] We expect that the resulting variable will be negatively related to the likelihood that a justice will vote to invalidate the statute.

Civil Liberties Cases. Where the constitutional challenge raises civil liberties issues, we hypothesized that the justices would be more likely to strike the challenged statute. To identify those cases involving civil liberties issues, we relied on the "issue" variable in the U.S. Supreme Court Database, identifying all cases that raised constitutional challenges relating to the First Amendment, Due Process, Equal Protection, Civil Rights

and Privacy (categories 210-537 in the database). All cases that fell in these categories received a value of 1 on the civil liberties variable, otherwise the variable was coded 0.

Selection Bias Control. As we discussed above, we are not able to control for the actual dynamics of the certiorari selection process, as relevant data on the certiorari process are not readily available.[10] However, we did construct a variable that we believe captured some of those selection dynamics, in an effort to control partially for selection bias (see Brace, Hall and Langer 2001). The variable labeled "Lower Court Disposition" is measured to reflect both the disposition of the court below[11]—if a lower court invalidated the statute (whether at the district court, circuit court or state court), we coded the variable as 1, and 0 otherwise. We coded the lower court's disposition of the constitutional challenge from the Supreme Court's opinion.

Statistical Method. Because our dependent variable reflects the dichotomous choice to invalidate or uphold a statute on its face, we utilized logit to estimate our model; given the potential that the justices' individual votes would not be independent across cases, we clustered on the justice (see Long and Freese 2001).[12] We present the results of our data collection process and model estimation below.

IV. Results

Table 1 about here.

Table 1 provides a breakdown of the characteristics of the cases in the database. Of the 452 constitutional challenges brought before the Burger Court, 199 resulted in the law's invalidation, at a rate of about 12 statutes struck per term on average. In comparison, in the Rehnquist Court, of the 238 challenges brought, 109 resulted in the invalidation of the challenged statute, at a rate of about seven statutes struck per term. Moreover, the Burger Court was more reticent to strike federal statutes, invalidating only 21% of federal laws challenged before the Court. In contrast, the Rehnquist Court invalidated 41% of federal laws challenged from 1986 to 2000. When it came to state or local laws, however, the two courts were about equally likely to strike a statute or ordinance as violative of the federal constitution (50% in the Burger Court, 47% in the Rehnquist Court). Thus, the Burger Court was more lenient toward federal statutes but, in general, evaluated the constitutionality of more laws than did the Rehnquist Court. On the other hand, the Rehnquist Court considered the constitutionality of fewer laws, but was more activist in striking federal statutes. At least in part, these differences may be due less to the justices' propensity to strike statutes and more to changes in the docket between the two Courts. During the Burger Court, the Supreme Court's docket was determined by Public Law 86-3 (28 U.S.C. § 1252), which provided for direct appeals to the Supreme Court from decisions invalidating Acts of Congress. This law was repealed in 1988. As a result, more appeals from decisions may have been

heard by the Supreme Court, although it seems unlikely that the Court would have denied certiorari in such cases in any event. Moreover, the Rehnquist Court has considered fewer cases each term than the Burger Court, and has devoted a lesser portion of its docket to constitutional cases as opposed to matters involving statutory construction.

The two courts also differ with respect to the age of the laws challenged and struck. Although the Burger Court was subject to a more expedited process regarding challenges to federal laws (i.e. the process of direct appeal described above), it nevertheless considered somewhat older federal statutes than the Rehnquist Court. The median age of federal laws challenged in the Rehnquist Court was only 7 years, compared to a 11.5-year median age for statutes challenged in the Burger Court, suggesting that litigants in recent years have been fairly swift in bringing constitutional challenges to new legislation, and that the Supreme Court has also been quick to take these appeals. The Burger Court had a slight tendency to strike newer federal laws, however. On the other hand, the Rehnquist Court evaluated older state laws than the Burger Court, on average, although both courts had a tendency to strike newer state laws. Thus, it appears that age is negatively, rather than positively associated with the likelihood of invalidation.

Table 2 and 3 presents the results of the logit models of the justices' voting behavior in judicial review cases in the Burger and Rehnquist Courts. These tables also provide results of models estimating the likelihood of a vote to invalidate federal and state legislation separately, allowing us to compare whether the impact of our variables depends on whether the law emerges from the federal or a state government. Tables 4 and 5 provide additional information regarding the interpretation of the logit results for the full models by presenting changes in the predicted probability of a vote to strike given a particular change in the value of the independent variables (with the other variables held at their medians). These values enable the reader to compare the impact of the variables on the justices' propensity to invalidate statutes challenged before them.

Tables 2-5 about here.

A. The Burger Court

Full Model. Almost all of our initial hypotheses received support from the data. First, as expected, consistency between the statute's direction and the justices' ideologies is statistically significant and the coefficient is negative. Thus, as the justices' attitudes become increasingly consistent with the statute's ideological content, the justices demonstrate a decreased willingness to strike the statute. As the statistics in Table 4 reveal, the relationship between ideology and individual votes to strike statutes has a significant substantive impact, changing the probability of a vote to strike by almost 49% over the range of the variable

from its 10th to 90th percentiles. However, the multiplicative term reflecting the interaction between the justices' ideologies and the source of the statute did not produce a statistically significant coefficient. That is, on the Burger Court, the justices' ideological reactions to legislative enactments were not conditioned on whether the statute emerged at the state or federal level. Figure 1 illustrates this point by providing a graphical representation of the relationship between liberal and conservative justices' willingness to strike federal and state laws in the Burger Court. Note that for both federal and state legislation, the liberal justices' voting patterns reveal the more pronounced impact of ideology. In the case of federal legislation in particular, conservative justices demonstrate a far more restraintist orientation toward the evaluation of its constitutionality. The same pattern is less pronounced but still discernible in the case of state legislation as well. Thus, in the case of both state and federal laws, liberals were more activist. In addition, the coefficient for the State Statute variable is significant and positive. Although interpretation of this variable is somewhat complicated by its inclusion in an interactive term, it nevertheless reflects the Court's greater willingness overall to strike state as opposed to federal statutes.

Figure 1 about here.

We also hypothesized that the executive branch would influence the justices' voting behavior through the Solicitor General. Although the impact of the Solicitor's participation is well documented, in these judicial review cases, the Solicitor's impact was limited to those cases in which he participated as an amicus in support of the challenged statute's constitutionality. As noted above, we initially created a variable reflecting the Solicitor's involvement representing the United States as a party to the litigation; this variable never achieved statistical significance in any of our model specifications. On the other hand, where the Solicitor supported the statute as an amicus curiae, the justices were less likely to vote to strike the statute, reducing the probability of a vote to strike by %8.7.

Justices on the Burger Court were also apparently influenced by cross-institutional considerations involving the legislature (whether consciously or unconsciously). Statutes that were consistent with congressional preferences were less likely to survive constitutional scrutiny by the individual justices. This variable has an 13.5% substantive impact on the likelihood of a vote to strike over its 10th to 90th percentile range. In contrast, the age of the statute was not significantly related to a vote to strike. Finally, where more amici briefs were filed in support of the statute than in opposition to it, the statute was more likely to generate a positive reaction from the justices. Civil liberties challenges produced more votes to strike laws as unconstitutional, perhaps due to the enhanced level of scrutiny employed in those cases. Moreover, the control

we added for selection bias was also statistically significant, although we did not specify an expected direction for this variable a priori. Nevertheless, the negative coefficient indicates that, where the lower court struck the statute, the Supreme Court justices were more likely to vote to uphold the law. This result is not surprising. First, where the lower court has struck the statute, it suggests that reasonable people could differ regarding the statute's constitutional infirmities. These circumstances should drive both the certiorari process (one would expect that a declaration of unconstitutionality would raise a case high on the Court's radar screen). And since the Supreme Court often takes cases in order to reverse, it is not surprising that the justices are more likely to uphold statutes that were struck below. The variable's significance also gives us some comfort that we have controlled for the selection bias resulting from the Court's discretionary docket.

Separate Models: Federal and State. The separate models—estimated by separating the dataset into cases involving state and federal legislation—reveal that in the Burger Court, the patterns of influence remain fairly constant regardless of the source of the legislation, with two exceptions. The first exception involves the influence of amicus curiae. When the Burger Court was faced with a constitutional challenge to state legislation, a preponderance of amicus briefs in favor of the legislation mitigated against its being struck down. Not so with respect to federal legislation, where the differential between numbers of amicus briefs supporting and opposing the statute had no significant influence on the justices' voting behavior. Moreover, the presence of a civil liberties challenge to a federal enactment did not mitigate in favor of a vote to strike, perhaps because there were fewer such challenges to federal statutes, many of which instead addressed constitutional questions under the commerce and supremacy clauses.

B. The Rehnquist Court

Full Model. Like the Burger Court model, most of the variables in the Rehnquist Court model were also significant and in the hypothesized direction. First, the variable reflecting consistency between the statute's direction and the justices' ideologies was statistically significant and the coefficient is negative. The greater the consistency between the statute's ideological direction and the justices' policy preference, the less likely it is that the justice will vote to strike the statute. Figure 2 graphically represents the relationship between this ideological congruity and the justices' propensity. Note that there appears to be some (albeit mild) relationship between the justices' ideology and their propensity to strike federal as opposed to state laws, with conservatives more influenced by their ideological reaction to federal legislation, and vice versa for liberal justices. This relationship was statistically significant, as the interaction term in the logit model reveals (and as confirmed using the inteff program (Norton, Wang and Ai 2004)). Thus, the conservative justices' rhetoric suggesting an

increased deference to state legislation is manifested in their voting behavior, but they are less restrained than their liberal counterparts in the case of federal legislation, as Figure 2 reveals. This is true even after controlling for ideological effects.

Figure 2 about here.

As for cross-institutional influences, the Solicitor's influence is even more important in the Rehnquist than in the Burger Courts. When the Solicitor supported the statute as amicus, the probability of a justice voting to strike the statute increased by 18.9%.; when he supports the statute as party, the probability of a vote to strike is reduced by 15.9%. He is also effective when opposing a statute as amicus, with an impressive 26.4% in crease in the probability of a vote to strike when he does so (which is a fairly rare event). In addition, our measure of the congruence between the statute and congressional preferences is significant and in the negative direction. Thus, it appears that as the consistency between the statute's ideological direction and congressional preferences increases, the justices are less likely to strike the statute. And, as in the Burger Court, no statistically significant relationship exists between a statute's age and the likelihood that a justice will vote to invalidate it.

The Rehnquist Court's members also respond to pressure from interests filing amicus curiae briefs. Since the measure reflects the number of briefs, rather than the number of interests responsible for the briefs, it is not a direct measure of individual interest group support. But indirectly, the coefficient's significance indicates that, in this important subset of cases, amicus involvement may have a critical impact on the justices' votes. Where the number of differential between supporting and opposing briefs shifts from -5 to 5, it decreases the probability of a vote to strike by 7.7 percent. Also, where a civil liberties-based challenge is brought against the statute, the justices are more likely to vote to invalidate it—by ten percentage points. And where the lower court struck down the statute, the Supreme Court was more likely to uphold the statute, a finding that probably reflects the Court's propensity to reverse.

Separate Models: Federal and State. Once the dataset is divided into two parts, the dynamics associated with the independent variables in the Rehnquist Court are somewhat clarified. While the models are fairly consistent, the federal model has less predictive power and two of the variables no longer achieve statistical significance. In the case of federal legislation, the justices appear to be less influenced by interest group pressure (this was true in the Burger Court as well). Nor does lower court disposition affect the Rehnquist Court's voting patterns in cases involving federal statutes.

V. Discussion

This paper presents a comprehensive model of Supreme Court justices' votes to invalidate or uphold federal, state and local statutes in cases involving constitutional challenges during the Burger and Rehnquist Court's 1969-2000 Terms. The portrait of the justices' voting behavior presented here reflects a variety of influences on the choice to invalidate statutes. Moreover, many of these findings are consistent with existing research on cross-institutional influences, interest group pressure, and the influence of the Solicitor General.

First, the justices' ideologies clearly affect their vote choice in these cases, thus once again confirming the preeminence of the attitudinal model as a predictor of the justices' behavior. Where the statute's ideological direction (liberal or conservative) is consistent with a justice's ideological orientation, the justice is less inclined to strike the statute. In the Rehnquist Court, this ideological influence is moderated by or conditioned on the source of the statute, with liberals more likely to strike statute statutes and conservatives more likely to strike federal statutes. This finding indicates that rhetorical support for judicial restraint is not manifested in the justices' voting behavior in cases involving judicial review of federal statutes in the Rehnquist Court.

As far as activism in general is concerned, conservative politicians and commentators often note the importance of "judicial restraint" and "strict construction of the Constitution." The implication is that conservative justices will be more restrained in their choices to invalidate legislation emerging from the democratic process. While this rhetoric has become particularly heated in more recent years, recent appointments of conservative justices to the Supreme Court do not appear to act in accordance with this policy. The patterns revealed in Figure 2 indicated that, on the Rehnquist Court, conservatives and liberals are almost equally likely to vote ideologically in choosing to strike both state and federal legislation. On the other hand, the relationship between conservatism and restraint is more pronounced in the Burger Court—especially in the case of federal legislation. As Figure 1 reveals, conservative justices are less inclined to invalidate both federal and state legislation, even when they disagree with that legislation ideologically. In the Burger Court, restraintist conservatives actually behaved accordingly. The same cannot be said for the Rehnquist Court, regardless of any rhetorical commitment to restraint by those on the Right.

Second, the justices are sensitive to their institutional context when they render their decisions in cases involving judicial review. As one would expect from the existing literature, the Solicitor General is influential in these cases, particularly when he enters the case as amicus in support of a statute's constitutionality (Segal 1990). This suggests that when the Solicitor is able to select cases in which to participate (with the exception of those cases in which the Supreme Court requests him to serve as amicus, in

which cases the amicus participation is essentially mandatory, see Pacelle 2003), he is quite adept at choosing cases in which his chosen position is likely to prevail. As in other cases, the justices appear to respect the position of the Solicitor even when exercising the coveted power of judicial review. In general, however, it is also interesting to note that the Solicitor's influence in these cases appears to have increased over time; the impact of the Solicitor is far more pronounced in the Rehnquist Court than in the Burger Court, a finding which warrants further inquiry.

The executive branch is not the only political institution that affects the Court's decision-making process. In our model, we find a contemporaneous influence of congressional preferences on the justices' voting behavior, a finding which is consistent with Epstein and Knight's (1998) proposal that separation of powers constraints may affect the Court even in constitutional cases, as well as the findings of Friedman and Harvey (2003) in the context of challenges to federal statutes (but see Salas and Spriggs 2004). In that sense, this result may reflect strategic behavior by the justices, but that is not clear. The influence of this variable may reflect the indirect impact of the public mood on the justices' voting behavior, or the justices' own evolving perceptions concerning appropriate public policy as part of the dominant political coalition. At the very least, it challenges the position that the Court will be sensitive to congressional preferences in statutory cases only—a position that has been repudiated by Segal (1999). Moreover, in both Courts, the impact of Congressional preferences appeared to be more slightly pronounced with respect to state statutes. While this result may seem counterintuitive, Meernik and Ignagni (1997) found that Congress was more likely to respond to the Court's decisions invalidating state as opposed to federal statutes. Our finding is thus consistent with existing research suggesting that retaliation by Congress in the form of bills to override judicial decisions is more likely to occur when state legislation is invalidated.

To the extent our findings indicate the influence of Congress on the Court's constitutional decisions, they are inconsistent with conclusions drawn by Howard and Segal (2004) in their study of the Rehnquist Court, as well as by Salas and Spriggs (2004). Howard and Segal concluded that the conservative justices did not appear constrained by their political environment in the years 1993 and 1994, when Democratic dominance of the elected branches could have affected their responsiveness to constitutional challenges to liberal statutes. The reason for our dissimilar findings may be methodological. Howard and Segal evaluated conservative justices' support for liberal and conservative requests to strike statutes in constrained years (1993 to 1994) and unconstrained years (1985-1992, 1995) by comparing percentage support for liberal and conservative statutes across those time periods. In our model, on the other hand, we evaluated the influence of congressional

preferences on all justices while controlling for other factors. It is possible, therefore, that political constraints operated more profoundly on liberal justices than on conservative justices.

Similarly, Salas and Spriggs concluded that the justices' ideological reactions to congressional enactments was not eliminated during particular periods and the ideological configurations of the two institutions created potentially greater constraints on the justices' willingness to vote in accordance with their ideological predispositions. While Salas and Spriggs present a rigorous analysis of the separation of powers thesis, their approach may not have allowed for a more subtle cross-institutional influence even after controlling for the justices' ideologies. We reiterate that the impact of our congressional variable may not reflect strategic behavior on the part of the justices, but rather the process by which the justices' assimilation in the social fabric, as well as membership change on the Court, affects the justices' perceptions of the constitutionality of legislative enactments. Moreover, our findings, like those of Salas and Spriggs (2004) indicate that the attitudinal variables exercise a far greater impact on the likelihood of a vote to strike than does our measure of congressional influence.

Curiously, while the justices do appear somewhat responsive to congressional preferences (or public opinion), our variable reflecting the age of the statute does not perform in the manner hypothesized by Dahl. Dahl suggested that the justices—as part of the current governing coalition—would be more inclined to strike statutes that had been enacted by previous majorities in Congress. Yet we find that the Court strikes younger rather than older statutes, and that the relationship between age and votes to strike is not significant in our multivariate models. Since the period of Dahl's research ended in 1956, it is possible that his findings are time-bound.

The justices also respond to other contextual influences and to legal factors. In particular, the differential in the number of amicus briefs filed in support or in opposition to the particular statute at issue influences the justices' voting behavior. This finding is relatively unusual, since the existing research generally supports the conclusion that amicus briefs influence the certiorari process more than they do the Court's decisions on the merits (but see McGuire 1995). In contrast, our findings indicate that, as the number of supportive amicus briefs increases relative to the number of briefs in opposition to the statute or ordinance, the less likely the justices will vote to invalidate the law. However, this influence is limited to cases in which a state statute was challenged. In the case of federal legislation, the justices appear more impervious to interest group pressures. And while our amicus variable presents a relatively coarse measure of amicus influence, but the raw numbers may indeed reflect the intensity of interest groups' focus on particular statutes. Finally, given the

higher doctrinal hurdles to a statute's constitutionality when civil liberties challenges are brought against the statute, it comes as no surprise that civil liberties challenges are most effective as the bases for constitutional challenges before the Court.

VI. Conclusion

The model presented here suggests that the justices' voting behavior in cases involving judicial review is the product of a nuanced process that is strongly governed by the justices' policy preferences. At the same time, the model also demonstrates that the justices' decisions are also affected by institutional and contextual influences in addition to those preferences. In short, the justices do not render these important decisions in a vacuum, but rather do so while considering or at least while subject to the influence of their complex political environment. As Segal and Spaeth note, the Court "has not marched to the beat of alien or enigmatic drums, even though those drums have typically beaten a stridently partisan cadence" (2002, 174; see also Rohde and Spaeth 1976, 145). Moreover, these cross-institutional and contextual influences have an important substantive impact on the justices' votes in these cases. For those critics who complain that the Court acts in a strongly countermajoritarian fashion without consideration for the preferences of other political actors or the public, this portrait of the justices' votes in cases challenging the constitutionality of state and federal laws should provide some, albeit limited, comfort. Clearly, the justices render these decisions in a highly contextualized fashion, demonstrating deference or at least sensitivity to Congress, the President and interest groups alike. Although Dahl's proposition that the Court conforms to the dominant majority by invalidating older statutes was not borne out by our analysis, his overarching conclusion that the Court does not buck current political tides is nevertheless supported by our findings, at least for the Court under the two most recent chief justices.

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Table 1: Descriptive Statistics
Cases Raising Constitutional Challenges to Federal, State and Local Statutes
Burger and Rehnquist Courts Compared

Variables	**Burger Court 1969-1985 Terms**	**Rehnquist Court 1986-2000 Terms**
	Frequencies	*Frequencies*
Federal Law Declared Unconstitutional?	Yes = 23 No = 85 (Mean = .21)	Yes = 33 No = 46 (Mean = .41)
State/Local Law Declared Unconstitutional?	Yes = 176 No = 174 (Mean = .50)	Yes = 76 No = 83 (Mean = .47)
Origin of Statute Challenged	Federal = 108 State/Local = 350	Federal = 79 State/Local = 159
Age of Federal Laws Challenged	Mean = 18.61 years (Std. Dev. = 18.44) Median = 11.5 years	Mean = 13.92 years (Std. Dev. = 14.11) Median = 7 years
Age of Federal Laws Struck	Mean = 17.2 years (Std. Dev. = 16.7) Median = 9 years	Mean = 14.30 years (Std. Dev. = 15.82) Median = 7 years
Age of State/Local Laws Challenged	Mean = 14.20 years (Std. Dev. = 19.52) Median = 7 years	Mean = 17.46 years (Std. Dev. = 22.07) Median = 9
Age of State/Local Laws Struck	Mean = 14.15 years (Std. Dev. = 19.17) Median = 6	Mean = 16.25 (Std. Dev. = 21.48) Median = 7
Position of Solicitor General	Support as Amicus: 7.4% Oppose as Amicus: 2.8%	Support as Party: 27.31% Support as Amicus: 12.61% Oppose as Amicus: 5.04%
Amicus Brief Differential (Supporting Amicus – Opposing Amicus)	Maximum = 17 Minimum = -7 Mean = 0	Maximum = 17 Minimum = -10 Mean = .029
N	452	238

Table 2: Logit Estimation of Justices' Votes
to Strike Challenged Statute/Ordinance, Burger Court 1969-1985 Terms
(with Hypothesized Direction of Coefficient)

Independent Variable	Coeff./Std Error (Full Model)	Coeff./Std Error (Federal Model)	Coeff./Std Error (State Model)
Consistency between Statutory Direction and Justice Ideology (-)	-1.74 (.215)***	-2.30 (.231)***	-2.21 (.144)***
Source of Statute (State)* Justice Ideology (+/-)	.464 (.305)	--	--
State Statute (+)	.870 (.103)***	--	--
Justice Ideology (+/-)	.550 (.260)**	--	--
Solicitor Support for Statute (amicus) (-)	-.362 (.120)**	--	-.339 (.109)**
Solicitor Opposition to Statute (amicus) (+)	-.123 (.153)	--	-.113 (.144)
Consistency between Statute Direction and Congressional Preferences (-)	-1.65 (.227)***	-.1.55 (.622)**	-1.79 (.285)***
Age of Statute in Years (Logged) (+)	-.047 (.032)	.034 (.041)	-.060 (.031)
Amicus Support for Statute (differential) (-)	-.050 (.011)***	.049 (.034)	-.069 (.014)**
Civil Liberties Challenge (+)	.224 (.079)**	.275 (.175)†	.162 (.095)*
Selection Bias Control Lower Court Disposition	-.448 (.051)***	-.877 (.166)**	-.347 (.066)***
Constant	-.693 (.104)***	-.526 (.195)**	.174 (.128)
Log-likelihood	-2272.99	-504.81	-1795.52
Pseudo R^2	.166	.145	.135
N	3938	935	3003

†p=.06, *p<.05, **p<.01, ***p<.001All coefficients generated in Stata 8.2, with robust standard errors, clustering on the justice. Model estimated using Judicial Common Space Scores. The federal model could not be estimated with the solicitor variables included, as such participation was too small in number.

Table 3: Logit Estimation of Justices' Votes
to Strike Challenged Statute/Ordinance, Rehnquist Court 1986-1999 Terms[1]
(with Hypothesized Direction of Coefficient)

Independent Variable	Coeff./Std Error (Full Model)	Coeff./Std Error (Federal Model)	Coeff./Std Error (State Model)
Consistency between Statutory Direction and Justice Ideology (-)	-1.742 (.141)***	-1.99 (.263)***	-1.90 (.144)***
Source of Statute (State)* Justice Ideology (+/-)	.829 (.326)**	--	--
State Statute (+)	-.054 (.190)	--	--
Justice Ideology (+/-)	-.197 (.330)		
Solicitor Support for Statute (party) (-)	-.643 (.163)***	-.761 (.183)***	
Solicitor Support for Statute (amicus) (-)	-.770 (.156)***	.--	-.808 (.146)***
Solicitor Opposition to Statute (amicus) (+)	1.37 (.213)***	--	1.86 (.192)***
Consistency between Statute Direction and Congressional Preferences (-)	-.966 (.419)**	-.844 (.505)*	-1.001 (.447)**
Age of Statute in Years (Logged) (+)	-039 (.050)	-.141 (.074)	.043 (.061)
Amicus Support for Statute (differential) (-)	-.032 (.016)*	.006 (.032)	-.039 (.011)***
Civil Liberties Challenge (+)	.411 (.134)***	.372 (.132)**	.469 (.222)*
Selection Bias Control Lower Court Disposition	-.359 (.076)***	.176 (.130)	-.547 (.098)***
Constant	-.130 (.203)	-.096 (.275)	-.096 (.326)
Log-likelihood	-1159.64	-382.03	-803.36
Pseudo R^2	.134	.117	.140
N	1992	644	1348

*p<.05, **p<.01, ***p<.001. All coefficients generated in Stata 8.2, with robust standard errors, clustering on the justice. Model estimated using Judicial Common Space Scores. One-tailed significance tests used with directional hypotheses.

[1] Judicial Common Space Scores are available only for the year 1953 to 1999; hence one year of the Rehnquist Court data was dropped for purposes of estimating this model. Alternative estimations using different ideology variables in the appendix include the final year of our data (2000).

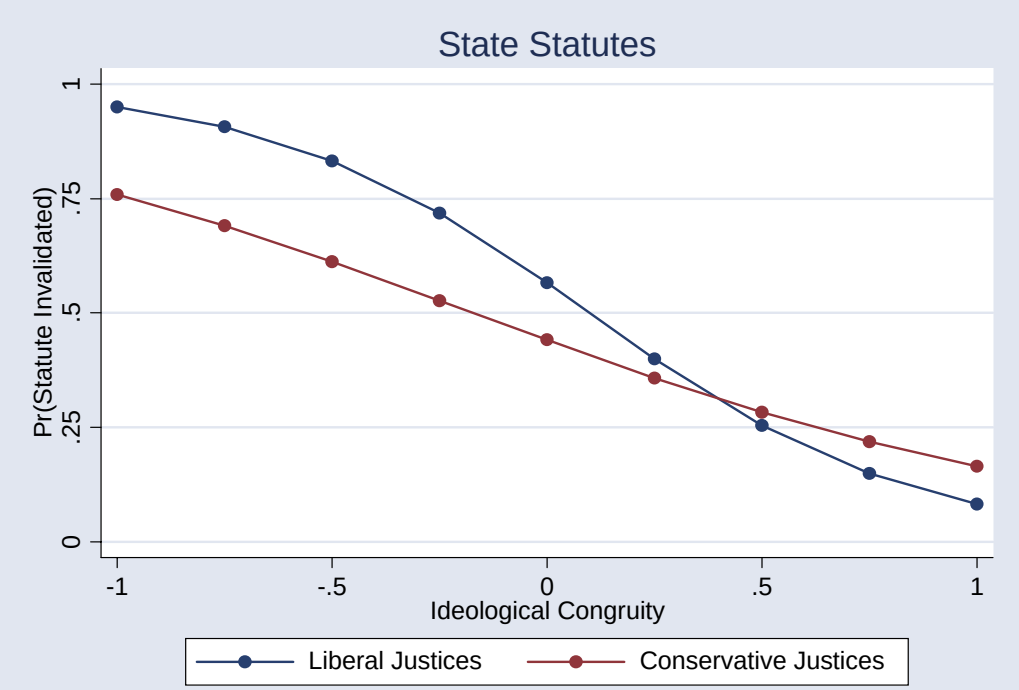
Table 4: Change in Predicted Probability of Vote to Strike Resulting from Changing Values of Independent Variables, Holding Other Variables at their Median
Burger Court

Variable	Change in Variable Value	Change in Predicted Probability
Ideological Congruence (Statute and Justice)	10th Percentile → 50th Percentile	- 26.4%
Ideological Congruence (Statute and Justice)	50th Percentile → 90th Percentile	- 22.5%
Solicitor Support/Amicus	0 → 1	- 8.7%
Congressional Congruence	10th Percentile → 50th Percentile	-6.9%
Congressional Congruence	50th Percentile → 90th Percentile	-6.6%
Amicus Support	-5 → 0	- 6.2%
Amicus Support	0 → 5	- 6.1%
Civil Liberties Challenge	0 → 1	+5.5%

Table 5: Change in Predicted Probability of Vote to Strike Resulting from Changing Values of Independent Variables, Holding Other Variables at their Median
Rehnquist Court

Variable	Change in Variable Value	Change in Predicted Probability
Ideological Congruence (Statute and Justice)	10th Percentile → 50th Percentile	-23.2%
Ideological Congruence (Statute and Justice)	50th Percentile → 90th Percentile	- 21.9%
Solicitor Support/Party	0 → 1	-15.9%
Solicitor Support/Amicus	0 → 1	-18.9%
Solicitor Opposition/Amicus	0 → 1	26.4%
Congressional Congruence	10th Percentile → 50th Percentile	- 1.2%
Congressional Congruence	50th Percentile → 90th Percentile	- 7.6%
Amicus Support	-5 → 0	- 3.8%
Amicus Support	0 → 5	- 3.9%
Civil Liberties Challenge	0 → 1	+10.2%

Figure 1: Relationship Between Ideological Congruity
and Propensity to Strike Federal and State Laws—Burger Court



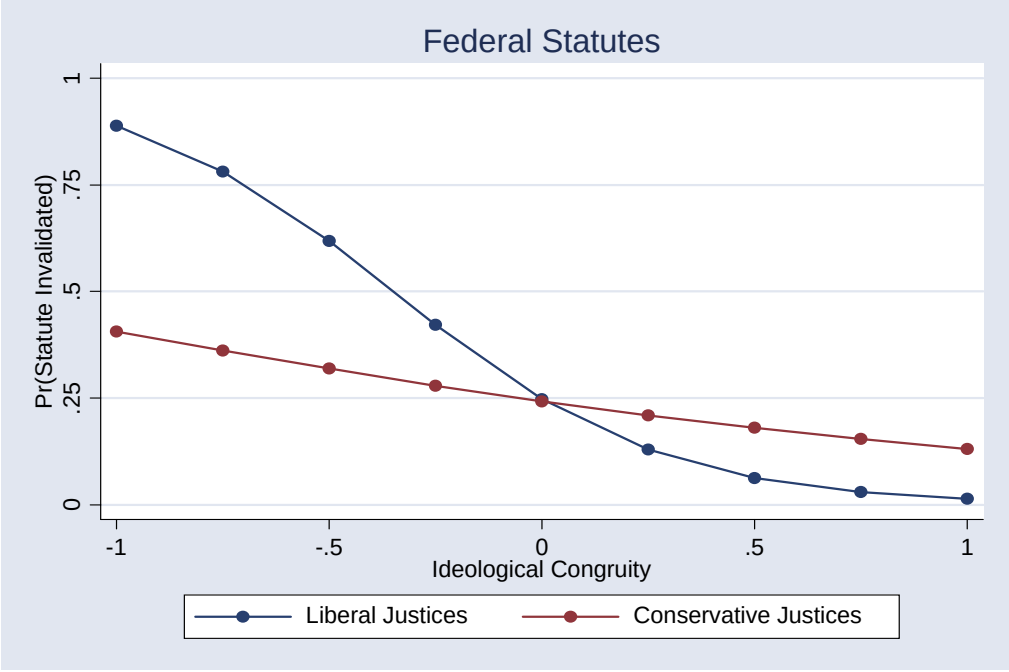
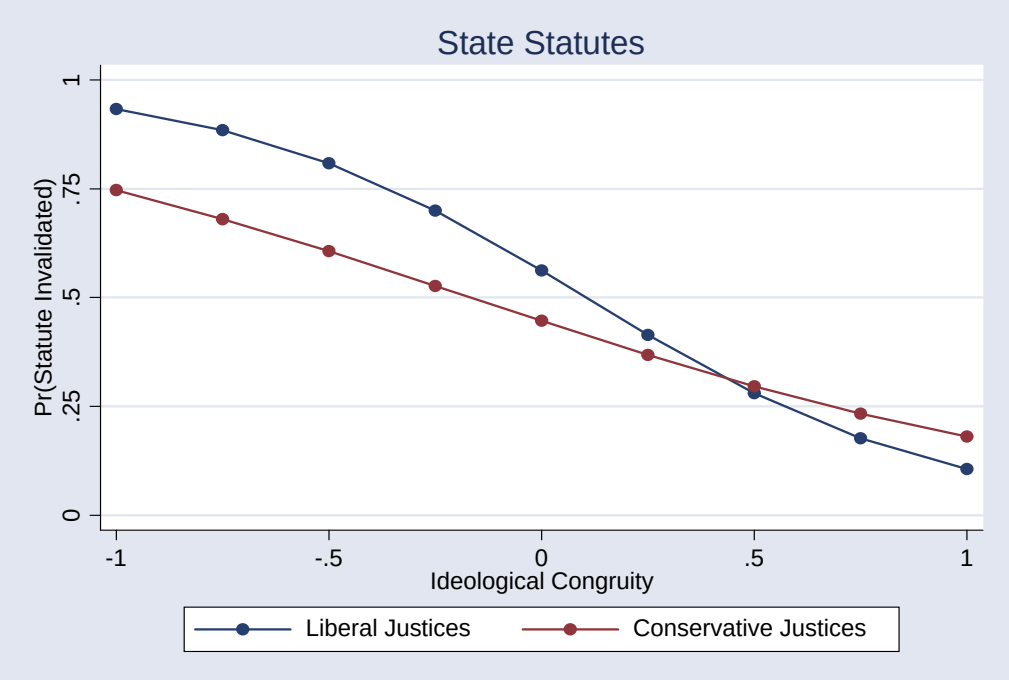
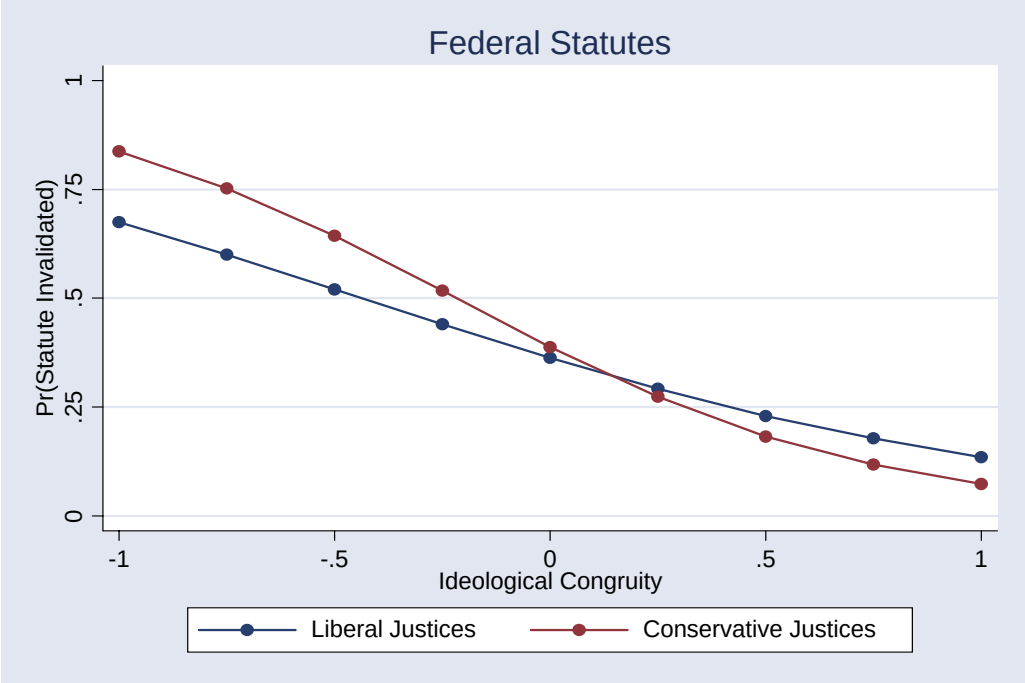


Figure 2: Relationship Between Ideological Congruity
and Propensity to Strike Federal and State Laws—Rehnquist Court





Appendix

Logit Estimation of Justices' Votes
to Strike Challenged Statute/Ordinance, Burger and Rehnquist Courts
(with Hypothesized Direction of Coefficient)
Using Segal and Cover Scores

Independent Variable	Coeff./Std Error (Burger)	Coeff./Std Error (Rehnquist)
Consistency between Statutory Direction and Justice Ideology (-)	-.743 (.226)***	-.575 (.250)**
Source of Statute (State)* Justice Ideology (+/-)	-.038 (.172)	.198 (.188)
State Statute (+)	.863 (.116)**	.159 (.224)
Justice Ideology (+/-)	.415 (.145)**	.008 (.146)
Solicitor Support (party) (-)	**	-.531 (.151)***
Solicitor Support for Statute (amicus) (-)	-.287 (.114)**	-.772 (.137)***
Solicitor Opposition to Statute (amicus) (+)	-.124 (.178)	1.35 (.208)***
Consistency between Statute Direction and Congressional Preferences (-)[2]	-2.51 (.952)**	-.185 (1.13)*
Age of Statute in Years (Logged) (+)	-.044 (.030)	-.151 (.041)
Amicus Support for Statute (differential) (-)	-.054 (.012)***	-.025 (.018)*
Civil Liberties Challenge (+)	.254 (.090)**	.473 (.118)***
Selection Bias Control Lower Court Disposition	-.390 (.052)***	-.275 (.072)***
Constant	-.674 (.124)***	-.001 (.188)
Log-likelihood	-2399.30	-1347.01
Pseudo R^2	.12	.06
N	3939	2089

*p<.05, **p<.01, ***p<.001. All coefficients generated in Stata 8.2, with robust standard errors, clustering on the justice. One-tailed significance tests used with directional hypotheses.

[2] Congressional preferences measured using Poole-Rosenthal Scores rather than the Judicial Common Space scores; values per term reflect mean of the median in the two chambers.

[1] 1 CR. (5 U.S.) 137 (1803)

[2] United States v. Morrison, 529 U.S. 598 (2000).

[3] Clearly, state supreme courts' exercise of judicial review may be equally consequential at the state level (see Langer 2002; Emmert 1992).

[4] Segal and Spaeth examined "actions" declared unconstitutional, which could include challenges to administrative action as well as direct challenges to particular legislation (see Segal and Spaeth 2002, 415). For this reason, their figures for the number of actions declared unconstitutional differ significantly from ours, which involve direct challenges to the constitutionality of specific statutory provisions.

[5] Heberlig and Spill (2000) examined whether the justices responded to *amicus curiae* briefs filed by members of Congress, and found little effect of such individualized participation. However, we are testing whether the Court responds to the overall disposition of Congress rather than the voices of one or several members.

[6] We confirmed that Segal and Spaeth (2002) had used this method through an e-mail exchange with Harold Spaeth, Feb. 20, 2003.

[7] Identifying the age of the statute often required historical research regarding the enactment date, since the West Code citation contains dates that do not necessarily reflect the actual date of enactment (but rather the most recent compilation and publication date of the particular code volume).

[8] Quadratic specifications of this variable did not produce significant results.

[9]We recognized that a simply difference score may not fully reflect the influence of amicus briefs, since it treats a 6-3 differential the same as a 3-0 differential, which present two quite different scenarios. We therefore constructed an alternative measure relying on a methodology developed by David Klein (2002) in his analysis of circuit panel's adoptions of new legal rules. His concern was with a variable reflecting the number of circuits that had adopted a particular legal rule where a conflict existed. Because a 3-0 split among the circuits was different than a 6-3 split, he adopted a strategy of subtracting the number of circuits that had adopted the particular rule from the number that had rejected the rule. Where adoptions outnumbered rejections, he multiplied the difference by the proportion adopting. Where rejections outnumbered adoptions, he multiplied the difference by the proportion rejecting. We followed the same principle with amicus supporting and amicus rejecting the rule. This new variable was similarly insignificant and had no significant effect on the remaining variables.

[10] Data on the cert votes for individual cases is available prior to the Rehnquist Court, but to fully account for selection effects, we would need cert data on all cases brought to the Court.

[11]In most cases, the lower court was the circuit court. In cases involving a direct appeal from the district court, we coded the Lower Court Disposition variable based on the disposition of the constitutional issue in the district court. In appeals from state supreme or appellate courts, we followed the same procedure.

[12] We considered clustering on the case as an alternative specification, but rejected it. According to Zorn (2006), the decision to cluster on the justice versus the case is dependent upon the model specification. Here, we anticipate that our model does a reasonable job of capturing within-case variation given the number of case related variables included and we expect that the latent dependence in the model is likely to lie between the individual justices rather than within included cases. In other words, there is consistency in the justices' views in judicial review cases, therefore it is more appropriate to cluster on the justice rather than the case.